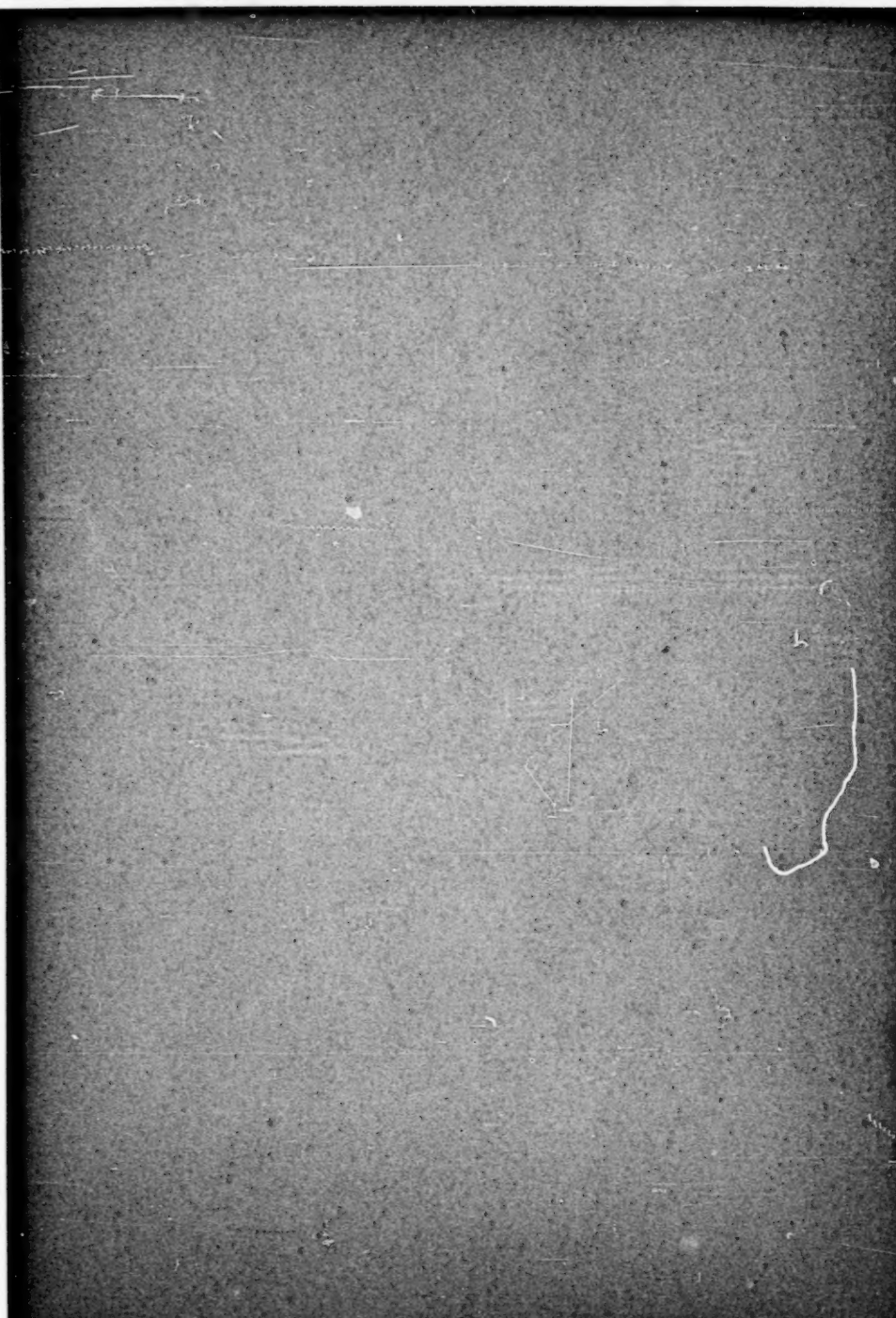

In The

SEP 14 1974

MICHAEL RODAK, JR., CLE

# Supreme Court of the United States

October Term, 1973

No. 73-1496

ERNESTO SANTO GONZALEZ,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REASONS FOR THE SUPPLEMENT TO THE PETITION FOR A WRIT OF CERTIORARI

After the filing of the petition for a writ of certiorari herein, the United States Court of Appeals for the Fourth Circuit, decided *United States v. Holley,* slip opinion, No. 73-2299, decided May 20, 1974. That case presented an eyewitness identification issue and, as in the case at bar, only one witness identified the accused as the criminal actor notwithstanding the fact that at least one other witness had the same opportunity to

make an identification but was unable to do so. Defense counsel in *Holley* did not request the trial judge to charge the jury with respect to eyewitness identification.[1] The Fourth Circuit unanimously vacated and remanded with directions that at the retrial the defendant "be accorded the benefit of the *Telfaire* instruction." *Holley, supra,* slip op. page 11.

## APPLICATION OF UNITED STATES v. HOLLEY TO THE CASE AT BAR

The *Holley* case has particular relevance to the case at bar in terms of furthering the evolutionary process relating to eyewitness identification instructions referred to at pages 15-18 of Gonzalez' petition for a writ of certiorari. In *Holley* reference is made to *United States v. Levi,* 405 F.2d 380 (4th Cir. 1968) which contained instructions to district judges in the Fourth Circuit setting forth standards and factors to be considered before sending an eyewitness identification case to the jury. Speaking for the Court in *Holley,* Judge Craven noted that the District of Columbia Circuit in *United States v. Telfaire,* 469 F.2d 552 (D.C. Cir. 1972) approved the instructions to the district judges as set forth in *Levi* and extended them by requiring that the instructions be given by the trial judge to the jury. *United States v. Holley,* slip op. page 6. As to this practice Judge Craven stated:

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1. The opinion in *Holley* is silent on this point and the writer makes the above representation based upon communications personally had with Charles W. Hawks, Jr., Esq. who served as counsel for Holley at trial and on appeal. Mr. Hawks, at my request has supplied me with a letter, a copy of which is annexed to this supplemental petition and marked Exhibit I. The letter lends support to the assertion herein made.

> "We agree that to guard against misidentification and the conviction of the innocent it is not enough that the trial judge himself be specifically alerted to the detailed factors that enter into the totality of the circumstances, but that the jury should also be so charged." *United States v. Holley,* slip opinion page 6.

In view of the statement in *Telfaire* that the trial judge should not rely upon counsel to request an identification instruction, (*Telfaire,* 469 F.2d 555 n.5), but that such instructions should be routinely given, and the action taken in *Holley* by the Fourth Circuit in the absence of a request to charge it may now be said that the Fourth Circuit requires that in a proper case a sua sponte charge on eyewitness identification be given.

Accordingly, the conflict as between the Third, Fourth and District of Columbia Circuits on the one side and the Second Circuit on the other, is more sharply delineated and, it is respectfully submitted, that review of petitioner's case is now even more appropriate.

## CONCLUSION

For the above reasons this Court should issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

FORCHELLI & SPIRN
*Attorneys for Petitioner*

Lawrence F. Sprin
*On The Brief*

## EXHIBIT I — LETTER OF SEPTEMBER 3, 1974

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September 3, 1974

Mr. Lawrence F. Spirn, Esq.
123 South Street
Oyster Bay, N.Y. 11771

RE: U. S. vs. Albert Holley

Dear Mr. Spirn:

In response to your recent inquiry concerning the original trial of Albert Holley which resulted in a reversal by the Fourth Circuit, please be advised that no request was made by trial counsel for the trial court to charge the jury in accordance with the rule of *United States v. Telfaire,* 469 F.2d 552 (d.c. cir. 1972). The trial court did however charge the jury with what was then the accepted identification charge in the Eastern District of Virginia.

*Exhibit 1*

Upon appeal of the conviction rendered in the District Court, no specific reference was made to the trial courts failure to charge the jury in accordance with the Telfaire rule.

Very truly yours,

s/ Charles W. Hawks, Jr.
Charles W. Hawks, Jr.

CWH,JR/vjl